recognized exception to the rule of the Statute of Frauds.[16] But it is difficult to explain its adoption at the beginning, except, perhaps, by saying that Chancery deemed it necessary in the interests of justice to evade this Statute as it had evaded the Statute of Uses over a century before.[17]

Many of the American decisions which seem to lean towards the English doctrine are distinguishable upon one ground or another. Some cases will be found to depend not upon the deposit of title deeds alone, but upon the deposit of title deeds together with the presence of some writing indicating that the deposit has been made as security.[18] The written instrument is enough to take these cases out of the Statute of Frauds, and they seem thoroughly sound, provided their doctrine is not extended so as to imperil a purchaser who had relied upon an official record and has had no notice of encumbrances which are unrecorded.[19] The fact that deeds had been deposited seems to have been less important in these cases than the fact that the intent to mortgage was evidenced by some writing,[20] and it would be possible to sustain the decisions solely upon the more general ground that equity will enforce as a mortgage a written instrument which happens to be insufficient at law. Another class of cases which may be supported upon the same ground, comprises those where the instrument deposited as security is a written contract to convey land, and not a title deed in the true sense of the words.[21] The presence of a writing seems to satisfy the Statute of Frauds and ought to be sufficient to give jurisdiction to equity as over an imperfect instrument of mortgage.[22] But it is interesting to note that one court has carried its repudiation of the English doctrine so far as to refuse to recognize any equitable mortgage where deeds had been deposited, even though the transaction was fortified by a writing and notice had been given the adverse claimant.[23]

CONTRACTS OF INSANE PERSONS.—Prior to the adjudication of insanity and the appointment of a guardian or committee, an insane person's contracts or conveyances are, with a few exceptions,[1] held

[16] *Cf.* note 1, *supra.*

[17] *Cf.* Ames, Lectures on Legal History, pp. 243-247; but see Keys *v.* Williams (1838) 3 Y. & C. 55.

[18] Mallory *v.* Mallory (1899) 86 Ill. App. 193; Higgins *v.* Manson (1899) 126 Cal. 467; *In re* Snyder (1908) 138 Ia. 553; *cf.* Mowry *v.* Wood (1860) 12 Wis. 460.

[19] *Cf.* Executors *v.* Trumbull (1865) 50 Pa. 509; Hackett *v.* Watts (1896) 138 Mo. 502; Griffin *v.* Griffin, *supra.*

[20] See Higgins *v.* Manson, *supra; In re* Snyder, *supra.*

[21] Hackett *v.* Watts, *supra; cf.* Bloomfield Bank *v.* Miller, *supra.* Although in the latter case what was actually deposited was a contract to convey, the court treated the situation as if a deposit of deeds had been made and on this theory, repudiated the English doctrine.

[22] See 3 Pomeroy, Eq. Jur. (3rd ed.) § 1266; *cf.* Parker *v.* Carolina Savings Bank, *supra.*

[23] Gardner *v.* McClure (1861) 6 Minn. 250. In this case it is suggested that the deposit of deeds creates a lien upon the paper of the deed itself. *Cf.* Pomeroy, Eq. Jur. (3rd ed.) § 1266.

[1] Executed contracts, in which the sane person acted in ignorance of the insanity of the other party, are generally held binding, if the parties cannot be put in *statu quo.* Ipock *v.* Atlantic etc. R. R. (1912) 158 N. C. 445;

merely voidable,[2] as was decided under statute in the recent case of *Walton* v. *Malcolm* (Ill. 1914) 106 N. E. 211. The absence of an assenting mind makes such a conclusion indefensible on principle;[3] but, as a practical matter, it is the result of an endeavor by the court to safeguard not only the interests of the insane person, but also of persons contracting with him in ignorance of his insanity.[4] Although there is really no analogy, the courts have attempted to support their position by comparing the contractual capacity of an insane person with that of an infant.[5] In this way, exceptions to the rule that an infant's contracts are voidable, have come to be applied also in the case of insanity.[6] However slight may be the justification of such decisions, the rule is now established that, prior to the inquisition of lunacy, an insane person's contracts are voidable.

At common law, the custody and care of insane persons was in the sovereign. The practice was for the lord chancellor, as delegate of the king, to issue a writ known as *de lunatico inquirendo* under which a jury held an inquisition.[7] In this country, jurisdiction is usually given by statute to courts of equity or probate, whose proceedings are of the same nature as those under the old writ.[8] Along with this provision for formal adjudication, which was designed to care for the property of the incompetent, there has grown up in this country a proceeding of a summary nature, the purpose of which is to protect the individual by confinement in a proper institution.[9] It is important to note the difference because in the former case an adjudication is at least presumptive evidence of insanity, while in the latter case some jurisdictions hold that mere confinement in an institution will not, at a subsequent date, be admitted as evidence of insanity.[10]

When, by proper proceedings, an individual has been declared incompetent to manage his affairs by reason of insanity, and a guardian or committee has been appointed, his subsequent contracts and con-

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Coburn *v.* Raymond (1904) 76 Conn. 484. Another exception, so-called, is the quasi-contractual liability of an insane person for necessaries. Sceva *v.* True (1873) 53 N. H. 627. The insane person is none the less liable after the appointment of a guardian or committee, if he is left unprovided for. See Creagh *v.* Tunstall (1892) 98 Ala. 249.

[2]Blinn *v.* Schwarz (1904) 177 N. Y. 252; Aetna Life Ins. Co. *v.* Sellers (1900) 154 Ind. 370; Woerner, American Law of Guardianship, § 129; *contra,* Walker *v.* Winn (1905) 142 Ala. 560; Farley *v.* Parker (1876) 6 Ore. 105.

[3]See 6 Columbia Law Rev. 115.

[4]See Eaton *v.* Eaton (1874) 37 N. J. L. 108, 116; Flach *v.* Gottschalk Co. (1898) 88 Md. 368, 374.

[5]See 6 Columbia Law Rev., *supra.*

[6]See note 1, *supra.*

[7]1 Bl., Comm. *303, *304, *305; see Sporza *v.* German Savings Bank (1908) 192 N. Y. 8.

[8]3 Witthaus & Becker, Medical Jurisprudence, 582; Woerner, American Law of Guardianship, § 116.

[9]As to the commitment and confinement of the insane, see 3 Witthaus & Becker, Medical Jurisprudence, 600.

[10]3 Wigmore, Evidence, § 1671, (5), (b). In the main, only formal adjudications of insanity are of practical concern in considering the effect of a determination of insanity on contractual powers, because most courts make active guardianship of property a test of absolute disability. See note 11, *infra.*

veyances are void.[11] It is said that such an adjudication is in the nature of a proceeding *in rem,* and is, therefore, notice to the world of the lunatic's disability. It is also argued that were this not true, a guardian would have great difficulty in performing his trust, being involved in perpetual litigation as to whether or not his ward had made contracts during sane intervals.[12] This latter reason would seem to be uppermost in the minds of the majority of the courts, since they do not consider the determining feature to be the adjudication of insanity, but the existence of an active guardianship. And so it has been decided, that there is merely a presumption of insanity which may be rebutted, and subsequent contracts held binding if made during a sane interval, in the case where there has been an adjudication of insanity and no guardian has been appointed, or if appointed, he has failed to take charge of the estate, or has later abandoned his guardianship, or if he has been removed for incompetency.[13]

Apart from statutory provisions,[14] upon the usual assumption that lunacy proceedings are in the nature of proceedings *in rem,* the adjudication of insanity and not the period of active guardianship should determine the status of the incompetent.[15] If the latter were to be considered the true test of contractual incapacity, the mere default of guardian would completely nullify the effect of the proceedings *in rem.* The argument, moreover, that active guardianship is necessary to give notice, seems untenable, since actual notice is never required in the case of proceedings *in rem,* which are essentially constructive notice.

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[11] 1 Parson, Contracts, 448; see *In re* Walker L. R. [1905] 1 Ch. 160. For a collection of New York cases, see O'Reilly *v.* Sweeney (N. Y. 1907) 54 Misc. 408. It has been held, however, that such an adjudication is merely presumptive evidence of insanity. Parker *v.* Davis (1860) 53 N. C. 460. It should be noted that in the case of marriage, an adjudication of insanity, and guardianship, are only presumptive evidence of incapacity. See note to Dunphy *v.* Dunphy (Cal. 1911) 27 Ann. Cas. 1230, 1240. The same is true of testamentary capacity, see Gardner, Wills, 128; note to *In re* Will of Van Houten (Iowa 1910) 140 Am. St. Rep. 340, 346.

[12] *Cf.* Wadsworth *v.* Sharpsteen (1853) 8 N. Y. 388; see Willwerth *v.* Leonard (1892) 156 Mass. 277; Leggate *v.* Clark (1873) 111 Mass. 308.

[13] 2 Page, Contracts, § 902.

[14] For a collection of statutes of the various States with regard to insanity, see 3 Witthaus & Becker, Medical Jurisprudence, 607.

[15] Redden *v.* Baker (1882) 86 Ind. 191; Kiehne *v.* Wessell (1893) 53 Mo. App. 667. See Carter *v.* Beckwith (1891) 128 N. Y. 312, which holds that insanity is deemed to continue, by a rule of law, as to all dealings with lunatics until the adjudication of insanity has been superseded by judicial restoration to sanity. There is, of course, not this conclusiveness in regard to contracts made prior to the inquisition but overreached by the finding of the jury. In such a case, the adjudication is only presumptive evidence of incapacity to contract. Hughes *v.* Jones (1889) 116 N. Y. 67.